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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

15 CR 867(RMB)

5 REZA ZARRAB,

6 Defendant.

7 -----x

8 New York, N.Y.
9 November 23, 2016
9:45 a.m.

10 Before:

11 HON. RICHARD M. BERMAN,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the
16 Southern District of New York

MICHAEL D. LOCKARD

Assistant United States Attorney

17 BRAFMAN & ASSOCIATES, PC

18 Attorneys for Defendant

JOSHUA KIRSHNER

19 LEWIS BAACH KAUFMANN MIDDLEMISS

20 Attorneys for Defendant

AARON T. WOLFSON

21 QUINN EMMANUEL URQUHART & SULLIVAN, LLP

22 Attorneys for Defendant

23 ADAM ABENSOHN

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(Appearances cont'd)

SULLIVAN & WORCESTER
Attorneys for Defendant
ANDREW SOLOMON

KIRKLAND & ELLIS
Attorneys for Defendant
EDMUND G. LACOUR

Also present: George Esayan, Turkish language interpreter

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1 (In open court)

2 THE COURT: Please be seated.

3 Counsel for Quinn Emanuel, if you could, come up and
4 join us.

5 First I should note that we have a Turkish language
6 interpreter, and ask Mr. Zarrab if he is able to understand
7 these proceedings with the help of the interpreter?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Good.

10 Also, preliminary thank you all for being here on
11 relatively short notice before a holiday tomorrow. Some of the
12 principal attorneys who most often come to court in this case
13 are not present today and are represented by colleagues of
14 theirs, members of their firms, etc., and I have asked them to
15 make sure that their representatives were familiar with these
16 proceedings and I am sure that has happened.

17 Perhaps we should with the government in hearing who
18 is here and whom they represent today.

19 MR. LOCKARD: Good morning, your Honor. Michael
20 Lockard for the government.

21 MR. KIRSHNER: Good morning, your Honor, Josh Kirshner
22 from Brafman & Associates representing Mr. Zarrab. I have been
23 at every court appearance. I am familiar with the proceedings
24 in this matter.

25 THE COURT: Great.

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1 MR. LACOUR: Good morning, your Honor Edmund Lacour on
2 behalf of Kirkland & Ellis. I have been involved in the case
3 as well.

4 MR. WOLFSON: Good morning. Your Honor. Aaron
5 Wolfson, Lewis Baach Kaufmann Middlemiss. I have been on the
6 matter for several months now.

7 MR. SOLOMON: Good morning, your Honor. Andrew
8 Solomon. I am Harry Rimm's partner from Sullivan & Worcester.
9 I am here and Mr. Rimm is here for purposes of a Curcio
10 hearing.

11 MR. ABENSOHN: Good morning, your Honor. Adam
12 Abensohn from Quinn Emmanuel for Mr. Zarrab.

13 THE COURT: I appreciate your all being here.

14 I just want to make some remarks preliminary and then
15 I want to hear from the government and any of you who wish to
16 be heard.

17 The first comment I would like to make is that it is
18 the fundamental objective of this Court, myself, and virtually
19 all courts, to ensure that the defendant in a criminal case, in
20 this case Mr. Zarrab, gets fairly treated throughout the case
21 and also receives a fair trial. That is the overwhelming
22 objective as I see my role. One element is that he be
23 represented by conflict-free counsel, and in this regard I just
24 want to cite or quote from a few decisions that help frame our
25 discussion here today.

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1 One is this: "When a District Court is sufficiently
2 apprised of even the possibility of a conflict of interest, the
3 Court first has an inquiry obligation. Whenever the Court's
4 inquiry reveals that a criminal defendant's attorney in fact
5 suffers from an actual or potential conflict, the Court has a
6 subsequent disqualification/waiver obligation. If the Court
7 discovers that the attorney suffers from a severe conflict
8 such that no rational defendant would knowingly and
9 intelligently desire the conflicted lawyer's representation,
10 the Court is obliged to disqualify the attorney. If the Court
11 discovers that the attorney suffers from a lesser or only a
12 potential conflict of interest such that a rational defendant
13 could knowingly and intelligently desire the conflicted
14 lawyer's representation, the Court should follow the procedures
15 set out in *United States v. Curcio* (2d Cir. 1982) in order to
16 obtain directly from the defendant a valid waiver of his right
17 to a nonconflicted lawyer."

18 "Federal courts have an independent interest in
19 ensuring that criminal trials are conducted within the ethical
20 standards of the profession and that legal proceedings appear
21 fair to all who observe them." That is a quote from *Wheat v.*
22 *United States*, 486 U.S. 153, a 1988 case.

23 Of course the backdrop here also is that the
24 defendant, every defendant, has a right to select the counsel
25 of his choosing. The second backdrop is I want to make clear

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1 that there has been no finding of any actual conflict or even
2 potential conflict. The issue has been put on the table,
3 however, as a result of a submission from the government.

4 So the reason for getting together today is somewhat
5 to discuss the calendar, the time frame, which we'll have
6 proceedings to review and resolve any actual or potential
7 conflicts of interest or determine that there are none as were
8 alleged by the government on November 18, 2016, with respect to
9 defense counsel Kirkland & Ellis. The government asserts
10 generally -- I don't want to put words in their mouth. They
11 will speak for themselves -- that the conflict stems from the
12 fact that Kirkland & Ellis, which recently merged -- I guess
13 that is the right word or perhaps there is a better word --
14 with the Bancroft Firm of defense counsel Mr. Clement, Mr.
15 Lacour and Viet Dinh who have been active in this case who also
16 represents Deutsche Bank and Bank of America and that these two
17 banks, Deutsche Bank and Bank of America, are two of the banks
18 which Mr. Zarrab allegedly used to effect allegedly illegal
19 transactions which are the subject of the criminal proceeding.

20 If I might turn to government counsel for the moment
21 just to see if that is a fair statement of your allegation.

22 MR. LOCKARD: It is, your Honor. Just to supplement
23 that a little bit, while our trial witness list has not yet
24 been finalized, there are a number of banks, including Bank of
25 America and Deutsche Bank, who are potential live trial

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1 witnesses, which is another reason why we thought it prudent to
2 draw this issues to the Court's and counsel's attention.

3 THE COURT: Mr. Lockard, maybe you can go up to the
4 podium so that people can better hear.

5 MR. LOCKARD: Yes, your Honor.

6 In addition to the potential trial limits issue, just
7 to further supplement the record a little bit, in the
8 government's discussions with defense counsel about this
9 potential conflict issue on I believe Tuesday of last week, we
10 also provided to Kirkland & Ellis a list of all the banks that
11 we believe to be potential victims of the conduct that is
12 alleged in the second superseding indictment, numbering
13 approximately 11 banks so that they can further vet that issue
14 with respect to any banks that we had not already identified in
15 our Curcio letter.

16 THE COURT: Did you have conversations before you sent
17 the Curcio letter; did I get that right?

18 MR. LOCKARD: Yes, your Honor. We spoke with defense
19 counsel I believe Tuesday of last week a day or two prior to
20 submitting our letter to the Court.

21 THE COURT: Kirkland & Ellis in response to the
22 government's letter contend and assert that there is no
23 conflict. They also have willingly joined in the Court's
24 determination that there should be a so-called Curcio hearing
25 and they also propose -- they will flesh this out better than I

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1 -- to establish what they referred to as an "ethical wall"
2 within the firm that would resolve any conflict or potential
3 conflict. I think it probably best to hear from them.

4 Before I do so, as I mentioned before, the issue in
5 this kind of situation is determining or balancing the right of
6 the accused to select counsel of his choosing against his
7 constitutional right to ensure that we have the highest ethical
8 standards of professional responsibility.

9 Perhaps, Mr. Lacour, you can tell us if I correctly
10 summarized your position or if you would add to what I have
11 said in any way.

12 MR. LACOUR: Yes, your Honor. Your Honor has
13 correctly stated our position, which we have put forth in our
14 response letter we filed I believe on Monday. We have as we
15 described put in place an ethical wall which only allows
16 attorneys who have been precleared by our general counsel to
17 work on his matter to access his data and to discuss the
18 matter, which we believe while we have taken the position we
19 don't think that there is a conflict or potential conflict, we
20 have explained to Mr. Zarrab the government's view of where
21 there could be a potential conflict. We have done that also in
22 the presence of other counsel that he has in this case who are
23 not members of Kirkland & Ellis in the event that he had
24 questions and he did not want to ask us or thought it was
25 inappropriate to ask us. We also stand ready to further

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1 explain the wall of defense counsel to the Court as well.

2 THE COURT: From what I understand I hear you have had
3 a discussion about the situation with Mr. Zarrah, number one;
4 right.

5 MR. LACOUR: Yes, your Honor.

6 THE COURT: You have explained I am sure about the
7 whole nature of a Curcio proceeding and how this has come about
8 with the government's letter, etc.?

9 MR. LACOUR: Yes, your Honor. We reviewed the Curcio
10 letter that the government' filed. We have reviewed the
11 government's postscript for the hearing. We have talk through
12 the issues there and any questions that he had, again, in the
13 presence of co-counsel who are not members of Kirkland & Ellis
14 in the event he had questions for them that he didn't want to
15 ask us.

16 THE COURT: That's the team that is already in place?

17 MR. LACOUR: Correct, your Honor. We have not yet met
18 with court-appointed counsel.

19 THE COURT: Could you just briefly for my benefit
20 describe the ethical wall and how that works? You and
21 Mr. Clement and Mr. Dinh arrived at Kirkland with this case?

22 MR. LACOUR: Yes, your Honor.

23 THE COURT: When in relation to that was the ethical
24 wall set up?

25 MR. LACOUR: We did not perceive there was an ethical

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1 issue at the time when we came over.

2 THE COURT: Did not?

3 MR. LACOUR: Did not, your Honor.

4 THE COURT: Okay.

5 MR. LACOUR: The wall was not instituted until after
6 we had heard from the government and they had raised this
7 proposed issue.

8 THE COURT: Is that a matter of weeks or months from
9 when you got there?

10 MR. LACOUR: Yes. We formerly joined the firm -- my
11 dates are a little -- this is our fourth week at the firm.

12 THE COURT: I see.

13 You heard from the government last week I take it
14 before they sent the letter?

15 MR. LACOUR: Yes. I looked back and the e-mail
16 traffic is suggesting that the call was actually on Wednesday
17 as opposed to Tuesday; but in all events, we heard shortly
18 before they filed the letter, which was filed with the Court on
19 Friday, November 18th.

20 THE COURT: Preliminarily are you saying that the
21 ethical wall solves the problem or there is no problem?

22 MR. LACOUR: The wall was put in place out of an
23 abundance of caution to further assure to Mr. Zarrab that there
24 would not be potential issues beyond ones that we've already
25 described to him, but we have made him aware of what could be

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1 potential issues in this case. We're ready for the Curcio
2 hearing, which he will be able to after consulting with his
3 court-appointed counsel discuss with the Court his position on
4 everything.

5 THE COURT: You then I take it discussed with
6 Mr. Zarrab the process of the Court having an independent
7 counsel who would confer with him?

8 MR. LACOUR: Yes, your Honor.

9 THE COURT: That is Mr. Rimm --

10 MR. LACOUR: Correct.

11 THE COURT: -- who is represented here today by his
12 partner.

13 Chambers gave him the complaint and the two letters
14 back and forth between you and the government on the issue. So
15 he is familiar with the issue. Also, and I understand that
16 this tentatively is arranged, he knows that a Turkish language
17 interpreter is -- that we always have one at least on standby
18 if not simultaneous translation. Mr. Rimm would know to
19 contact the interpreter before arranging the conversation --

20 MR. LACOUR: Thank you, your Honor.

21 THE COURT: -- with Mr. Zarrab.

22 Did you have more that you wanted to add?

23 MR. LACOUR: One question for the Court. In you order
24 you asked for a further supplement as to when we learned about
25 this potential conflict. We're happy to provide that later

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1 today in writing if you would prefer.

2 THE COURT: I understand from what you said that you
3 learned about it last Wednesday?

4 MR. LACOUR: Yes, your Honor. We'll submit that in
5 writing.

6 THE COURT: A short note to that effect would be fine.
7 The other question that I have for you relates to Bank
8 of America and Deutsche Bank. It seems to me, and as I
9 indicated in an order that I put out yesterday dated
10 November 22, 2016, I would be interested in hearing from them
11 in a way that is comfortable. If they wish to testify at the
12 Curcio hearing, they are welcome to do that. That is their
13 call. I would like to know, and I don't know if you know now,
14 and have the assurance that they were consulted and that they
15 are okay with whatever procedures you all have put in place.

16 MR. LACOUR: Your Honor, we have reached out to the
17 them as of yesterday upon receiving your order about the Curcio
18 hearing, and I do not believe we have heard back from either
19 bank yet. We are actively trying to secure something in
20 writing from them and also let them know that they have every
21 right to come testify if they would like. We will certainly
22 endeavor to have something from both clients by the time of the
23 hearing.

24 THE COURT: Thank you.

25 MR. LACOUR: We cannot guarantee that, but we're

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1 certainly pushing hard for it.

2 THE COURT: Thank you.

3 Now let's talk about the hearing. I am scheduling the
4 Curcio hearing for Monday the 28th at 9:30 a.m. The reason
5 that I picked that relatively quick scheduling has to do with
6 the fact that as you are all aware there are two suppression
7 hearings which were initiated by the defense, including one
8 which was initiated by Kirkland & Ellis, and those hearings are
9 scheduled for Wednesday, November 30, also next week at
10 9:15 a.m. My perspective on this is that there cannot be any
11 action or proceeding, including these suppression hearings,
12 much less a trial of this case, unless and until we resolve the
13 alleged conflict of interest issues. I do note that counsel
14 have already postponed the suppression hearings once from
15 November 22 to November 30. I think that was done to
16 accommodate the Kirkland application for suppression, which was
17 somewhat different than the defense counsel's application. So
18 I would prefer that there not be any further delay.

19 In preparation for the Curcio hearing, which both
20 sides, government and defense, have agreed is appropriate and
21 as I have also set forth in the order dated November 22, 2016,
22 several steps are required. As you've heard I have taken the
23 first step by appointing CJA counsel, Harry Rimm, who was the
24 CJA counsel on duty yesterday when I issued my order to assist
25 the Court by serving as independent counsel in this matter for

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1 purposes of the Curcio hearings. His responsibility is to meet
2 and confer with Mr. Zarrab with an interpreter if that is
3 required and to ensure that Mr. Zarrab fully understands the
4 Curcio issues and his rights with respect to the Curcio
5 proceeding and the line of questions which I will pose to him
6 during the Curcio proceeding. Mr. Lacour indicated that that
7 has happened already as described and we need to have it happen
8 one more time with independent counsel.

9 As I mentioned before Mr. Rimm is with Sullivan &
10 Worcester and is represented here today by Mr. Soloway.

11 MR. SOLOMON: That's correct, your Honor.

12 THE COURT: Defense counsel also have responsibilities
13 in preparation for the Curcio hearing of course and it sounds
14 like they are well on their way to meeting these
15 responsibilities. The first of course is to confer with
16 Mr. Zarrab, which appears has already happened. Next is to
17 confer with Deutsche Bank and Bank of America to obtain their
18 statements vis-a-vis the Curcio issues, which seems to have
19 been initiated but certainly not completed. As counsel is
20 aware they are invited to testify at the Curcio hearing. If
21 they wish, it would be satisfactory if they submit a written
22 statement as well. Also, everyone knows the need to review the
23 Rules of Professional Conduct, New York rules, and will
24 ultimately need to advise me their view as to whether or not
25 everybody is in "compliance" with those rules.

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1 That is what is on my mind and my agenda for today. I
2 am happy to hear from anybody if they wish to be heard.

3 MR. SOLOMON: May I address the Court, your Honor?

4 THE COURT: Sure.

5 MR. SOLOMON: Mr. Rimm because of the holidays has
6 asked --

7 THE COURT: You are Mr. Soloway?

8 MR. SOLOMON: Andrew Solomon from Solomon & Worcester
9 where Mr. Rimm is a partner.

10 Mr. Rimm said that he is traveling on the holidays and
11 he is concerned that he won't be able to have an opportunity to
12 meet with the defendant before 9:30 in the morning on Monday,
13 particularly with the added complication of retaining an
14 interpreter. So he has asked at a minimum that the Court move
15 that 9:30 time at least a couple hours later in the day so that
16 he has an opportunity to meet with the defendant.

17 THE COURT: Let me take that under advisement.

18 You should know in my personal career, the first month
19 I was an associate at a well-known New York law firm, on
20 Thanksgiving Day the firm sent me by plane -- this was before
21 fax and courier and FedEx -- to San Francisco on Thanksgiving
22 Day to obtain the signature of one of our clients on an
23 agreement. So I flew into San Francisco and I took a \$100 cab
24 ride to this fellow's house and got his signature and got back
25 on the plane and flew to Los Angeles where I obtained the

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1 signature of another senior executive. That is all on
2 Thanksgiving Day. Once I had done that, I got on the plane at
3 the end of the day and flew back to New York. So times may
4 have changed, but I just want you to know what my perspective
5 is about Thanksgiving. It is a wonderful holiday but this is a
6 serious matter that we have going here. someone's liberty is at
7 issue and at stake. I will try to be accommodating, but I
8 don't have a lot of sympathy. Today is Wednesday and we're
9 talking about Monday and that's a long time in my view.

10 I will take your request under advisement.

11 MR. SOLOMON: Thank you, your Honor.

12 MR. KIRSHNER: Your Honor, Josh Kirshner. After
13 hearing the Court's comments on keeping the schedule intact for
14 both the Curcio hearing and the suppression hearings that were
15 scheduled currently for the 30th, I still have to make this
16 request to have a slight adjournment of both of those hearings.
17 The Monday morning Curcio hearing not only is complicated a
18 little bit because of Mr. Rimm's schedule and his need to meet
19 with the defendant in a meaningful way to discuss the Curcio
20 issues but also as Mr. Lacour mentioned the Kirkland & Ellis
21 firm is having a little bit of difficulty contacting banks at
22 issue.

23 THE COURT: I would bet the ranch as they say they
24 will overcome that difficulty.

25 MR. KIRSHNER: It would be our request nonetheless

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1 understanding the Court's position on this to have the Curcio
2 hearing on -- and we understand that the Curcio issues have to
3 be resolved before we can have the proceedings of the
4 suppression issue. So we would ask that the Curcio hearing be
5 moved to Wednesday the 30th and then for a slight adjournment
6 of the suppression hearing or hearings depending on your
7 Honor's decision on that.

8 THE COURT: Right. I get it.

9 MR. KIRSHNER: We consulted with the government and
10 they agree.

11 THE COURT: I will take it under advisement as well.

12 MR. LOCKARD: Your Honor, the government doesn't
13 really take a position on the scheduling issues.

14 I will take the podium.

15 The government doesn't necessarily take a substantive
16 position on the scheduling issues, though, we have been
17 preparing to have a suppression hearing on the 30th and we'll
18 still be prepared to do so if that date sticks. We have no
19 objection to adjournment if that assists defense counsel and
20 conflict counsel in having meaningful conversations with the
21 defendant and accomplishing further tasks. We have no
22 objection to that.

23 The issue that is important to us to from a scheduling
24 perspective is just a clarity of finality because we'll have
25 witnesses travel into the city for the hearing. They are

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1 scheduled to fly in on Monday.

2 THE COURT: For the suppression hearings?

3 MR. KIRSHNER: For the suppression hearings.

4 If that date is going to move, then that is something
5 that we would like to know sooner rather than later so we can
6 make adjustments as necessary.

7 THE COURT: My tentative thinking is I am going to try
8 to keep that November 30th date for the suppression hearings.
9 There may be some flexibility in the start of the Curcio
10 hearing. Even if we do of course you appreciate who knows what
11 is going to come out of the Curcio hearing so that obviously
12 would impact Wednesday the 30th, but it is my intention to try
13 to hold onto that date.

14 MR. LOCKARD: We understand and we'll make adjudgments
15 as necessary and we understand that the Court will take those
16 concerns subject to having to be sort of fluid in responding to
17 how things develop at hearings where you don't know the outcome
18 in advance.

19 The other issue I would like to address briefly -- we
20 can either address this this morning on the record or we can
21 put it in a letter later today which we had anticipated doing
22 prior to this conference being scheduled so now seems to be a
23 convenient opportunity to raise it -- is that there has been a
24 reference to whether there is going to be the one set of
25 motions addressed at the hearing or both sets of motions

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1 addressed at the hearing. I know that the Court has the papers
2 on the *Franks* motion in front of it. As set forth in the
3 government's opposition, we don't think that the defense has
4 satisfied its burdens showing entitlement to a *Franks* hearing.
5 That is the issue I wanted to address briefly because we also
6 have a deadline tomorrow to submit an affidavit, which we are
7 prepared to do tomorrow by noon if it is necessary.

8 THE COURT: I would appreciate it if you could put
9 that on the record your rationale, and also if Mr. Kirshner or
10 anyone wants to address the issue.

11 MR. LOCKARD: Certainly. So the Court already has our
12 briefing. I just wanted to raise it again because a *Franks*
13 hearing is a different animal both legally and pragmatically
14 from a typical suppression hearing so we wanted to address that
15 fact. It is a different animal legally because there are two
16 burdens that the defense has to meet before showing their
17 entitlement to an evidentiary hearing.

18 Under *Franks* and its progeny here in the Second
19 Circuit, the first one being a legal issue, which is strictly
20 for the Court to determine, and that is whether the allegedly
21 omitted facts, since this is an omission *Franks* argument, not a
22 falsity *Franks* argument, that the allegedly omitted facts are
23 necessary to the probable cause determination. In other words,
24 that the magistrate judge could not have issued the warrant if
25 the alleged omitted material had been included and that is a

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1 strictly legal question that there is no factual development
2 appropriate or warranted for it. That is the first burden they
3 have to show. We have explained why we don't think they can
4 meet that burden and why they haven't identified a sufficient
5 basis for the Court to make that determination.

6 The second burden the defense has to meet is to make a
7 substantial preliminary showing that the allegedly omitted
8 information was omitted intentionally or recklessly. That is
9 where they intend to lead the Court. For the same reason we
10 don't think they have made that substantial preliminary factual
11 showing. It is consequential in that context because of the
12 nature and the factual inquiry, which makes it a slightly more
13 significant type of evidentiary hearing than an ordinary
14 suppression hearing because the issue of a *Franks* hearing is
15 did the affiant know about the information that was omitting,
16 did the affiant believe it was material and--

17 THE COURT: You are saying affiant, a-f-f-i-a-n-t.

18 MR. LOCKARD: -- and that the affidavit omitted that
19 information with the intent to mislead the magistrate, which
20 leaves you a pretty significant scope of the issue with respect
21 to the hearing. The government if there were a hearing would
22 contend that the scope should be fairly limited; but when you
23 are talking about an agent's intent in understanding the
24 materiality and in a multi-year counterintelligence
25 investigation, there is a potential for significant

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1 disagreement about the scope of that issue, which leads to
2 potential significant disagreement about the scope of things
3 like 3500 obligations, which would raise significant and
4 consequential issues that would have to be addressed probably
5 by way of prehearing motion practice.

6 So it is a significant step to have a hearing and that
7 is why we think in this case it is appropriate that the defense
8 be held to their dual burden before the hearing is ordered,
9 which is also why in the interest of disclosure and candor with
10 both the Court and defense counsel, it is the government's
11 expectation that even if there were a hearing on the matter, we
12 think it is unlikely that the affiant would offer testimony and
13 in fact we think that the factual issue that the government
14 would seek to put on in a *Franks* hearing would go to inevitable
15 discovery because we think that the materiality and the intent
16 to mislead elements are so lacking in the defense motion that
17 we're comfortable with the record as it is and instead offer an
18 alternative ground for the Court to uphold the warrant based on
19 the level of discovery.

20 We wanted to take the opportunity this morning to
21 again highlight those two issues, which are a consequence to
22 the government.

23 THE COURT: Did you say at the outset that I had
24 scheduled you to make a filing tomorrow on Thanksgiving Day?

25 MR. LOCKARD: That's correct, your Honor.

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1 THE COURT: Well, even with my severe Thanksgiving
2 history as I described it before, that is an oversight. If you
3 need to the next day, Friday, that will be a more appropriate
4 day for filing.

5 MR. LOCKARD: We'll be prepared whatever date the
6 Court sets, whether it is tomorrow or Friday. In light of that
7 deadline, we thought it important to revisit that issue, that
8 preliminary question and whether they have made their showing
9 of entitlement.

10 THE COURT: Okay.

11 MR. LACOUR: Thank you, your Honor.

12 I would like to address two points. I will start with
13 the *Franks* hearing issue. I think we did set forth
14 sufficiently in our opening motion and in reply as to why the
15 omitted facts were necessary for the establishment of probable
16 cause for the government. This was a multi-year
17 counterintelligence investigation. This warrant looking for
18 the right to access Mr. Zarrab's e-mails still relied if not
19 exclusively very heavily on this Turkish investigative report.
20 As we explained from multiple public sources, because we don't
21 know exactly what that agent had available to her but we can
22 presume that she at least was available -- or at least knew
23 what was being widely reported in the press, for example, The
24 New York time, The Economist. We can presume she at least knew
25 about those facts.

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1 I think we have shown that there is very good reason
2 to doubt the veracity of that report, the motives behind it,
3 its authenticity. It came out amidst of a very heated struggle
4 in Turkey and we would detail the political context there
5 repeatedly. None of this was mentioned to magistrate judge. I
6 think we would have seen more if they actually had more.

7 Moreover, had the magistrate judge been aware of the
8 very questionable providence of the centerpiece of the warrant
9 application, he would not have granted -- executed this
10 warrant. Inevitable discovery we can discuss later. It has
11 not been briefed up. But as the government pointed out in
12 their response, there were many, many key e-mails in the
13 government's mind that were there that I don't think the
14 government would have otherwise had access to. So we think we
15 more than established that legal point.

16 Second, we don't need to establish a substantial
17 showing that there was reckless behavior or intentional
18 omission on behalf of the agent. We don't have to definitively
19 prove that in the papers for obvious reasons. We cannot know
20 what was in her mind at the time, but we think based on the
21 publically available information mentioned it could not have
22 been an accidental omission on her part.

23 With regard to scheduling of the Curcio hearing, I
24 know that my partner Mr. Dinh could be available Monday morning
25 if we maintain the time we currently have, but later in the day

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1 would be difficult. Also, if we move the Curcio to Wednesday
2 in place of the motion to suppress, then we would also be able
3 to be available for that and that would also have the advantage
4 of giving us an extra couple days to get in touch with
5 pertinent contacts at the banks pertinent and get a written
6 submission from them. As stated earlier while we have reached
7 out, a lot of people are gone for the holidays and we have not
8 yet heard back from either of them.

9 THE COURT: Hold on one second.

10 (Pause)

11 THE COURT: Just for my planning purposes everybody is
12 talking about Monday and Wednesday, what about Tuesday? Are
13 you all available on Tuesday?

14 MR. LACOUR: I know that Mr. Dinh will not be
15 available on Tuesday. I believe he has a board meeting outside
16 of the D.C. area.

17 THE COURT: Mr. Kirshner.

18 MR. KIRSHNER: Your Honor, if it helps the Court for
19 scheduling purposes, I don't know if the motivation is to keep
20 the hearing date on the 30th because --

21 THE COURT: Well, I want to be reasonable as well. I
22 am trying to hear what the concerns are.

23 MR. KIRSHNER: This is not a concern. The hearing
24 date would potentially be a concern to the Court. We have a
25 tight schedule between the hearing and the January 23rd trial

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1 date. We discussed the issue of adjournment of the trial date
2 with the government. They have consented to a reasonable
3 adjournment. We have not confirmed amongst counsel involved in
4 the case whether we will be seeking an adjournment. I can say
5 we most likely will be.

6 THE COURT: Yes.

7 MR. KIRSHNER: We don't have a date yet that we will
8 be asking the Court, but if that helps the Court's scheduling.

9 THE COURT: Thinking.

10 MR. KIRSHNER: I can represent that we most likely
11 will be seeking an adjournment of the trial date.

12 THE COURT: I gathered that from our last conference
13 and I tried to indicate that I would accommodate you. Usually
14 it is the defense who wants to go sooner rather than later; but
15 when the defense wants to go later, I think that is their
16 prerogative certainly within reason. I would accommodate a
17 reasonable adjournment of the trial date. I will think about
18 these other dates also.

19 MR. LACOUR: Thank you.

20 THE COURT: Anybody else?

21 Yes, sir.

22 MR. LOCKARD: Your Honor, just one final thing. I
23 will just note for the record that we do intend to put in an
24 additional letter. This is again connected with the currently
25 scheduled suppression hearing on the search of the defendant's

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1 phone and a portion of the postarrest questioning. At the
2 discussion following the defendant's arraignment on the second
3 superseding indictment last week, there was some discussion
4 about defense's desire to call one of the two case agents who
5 was present during the arrest and we had a little bit of a
6 discussion about that potential request. As we said at the
7 arraignment and as we repeat again today if the Court directs
8 that that agent testify, of course he will be available and
9 will testify. We do intend to put in a short prehearing letter
10 just to clarify the government's position and the legal issues
11 with respect to the appropriateness of his testimony in light
12 of the affidavits of other witnesses.

13 THE COURT: Can you do that today?

14 MR. LOCKARD: We can do that today.

15 THE COURT: Good.

16 Obviously defense will have the opportunity to respond
17 to that.

18 MR. LOCKARD: We thought it worth writing up in
19 advance to the extent that it is helpful to the Court's
20 determination of the hearing.

21 THE COURT: Yes.

22 MR. KIRSHNER: May I have a moment to confer with
23 Mr. Zarrab?

24 THE COURT: Sure.

25 (Pause)

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1 MR. KIRSHNER: Your Honor, just to add a couple
2 things. Regarding the Curcio hearing, Mr. Zarrab asked that
3 we --although, he has spoken to Mr. Lacour, myself and other
4 counsel, he has not consulted with Mr. Brafman or Mr. Dinh, who
5 are lead counsel on this case and obviously very essential to
6 the issue. So that is another reason we would ask that the
7 Curcio be moved from Monday to a later date.

8 THE COURT: To Wednesday is what you asked?

9 MR. KIRSHNER: Well, yes, for scheduling purposes
10 everyone was planning on being here on Wednesday for one of the
11 suppression hearings anyway.

12 THE COURT: I am trying and have tried throughout to
13 be accommodating, but at some point I can't fix a date for 14
14 lawyers. Defense has got the biggest stake in this proceeding.
15 Having 14, somebody is going to be going to a board meeting or
16 here, at some point that is going to be very difficult to
17 accommodate all of those concerns. I do respect Mr. Zarrab's
18 concern that he wants to talk to Mr. Brafman and Mr. Dinh.

19 MR. KIRSHNER: Thank you, your Honor. We appreciate
20 that you have been nothing but accommodating. We really are
21 appreciative of that.

22 There is one more wrinkle in this.

23 THE COURT: Yes.

24 MR. KIRSHNER: If your Honor intends to proceed with
25 the suppression hearings on the 30th, we would ask that the

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1 phone suppression hearings go forward, but that if your Honor
2 grants a *Franks* hearing that that at least that one be pushed
3 back because there is a fair amount of complications going on.
4 We haven't received the affidavit. We don't know if the
5 hearing is going forth. If you want to proceed on the 30, we
6 ask it only be on the iPhone and we do a *Franks* hearing if it
7 is granted at a later date.

8 THE COURT: That sounds reasonable. Certainly the
9 Curcio will be moved to the Wednesday just hypothetically and I
10 don't know if it will be possible but to do some suppression
11 that same day or whatever. It is inconceivable that you can
12 ever get to a *Franks* hearing in one day. You have Curcio,
13 suppression and then *Franks*, that would be impossible.

14 MR. KIRSHNER: Thank you, your Honor.

15 THE COURT: Anybody else?

16 We'll try to set the dates, either confirm or
17 establish new dates in a little while. We'll put out an order
18 today.

19 There is one other question I have. Inevitable
20 discovery did you say was not fully briefed, Mr. Lockard?

21 MR. LOCKARD: That is correct, your Honor. So we
22 addressed the merits of the *Franks* motion in our opposition.
23 We noted in the brief that we would expect to prove inevitable
24 discovery if there were a hearing.

25 THE COURT: You didn't make the case for it as you

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1 would request to do if it came up?

2 MR. LOCKARD: That's correct. We don't have the
3 affidavit and the factual basis in front of the Court. I can
4 outline it very briefly.

5 THE COURT: No. No. I am trying to figure out the
6 mechanics if there were such a submission.

7 MR. LOCKARD: There had been suggestions of
8 posthearing briefing, which we thought also might be an
9 appropriate time to address the issue. So we wanted to
10 highlight it and then address it appropriately if the hearing
11 were ordered.

12 THE COURT: Does anybody else want to be heard?

13 Thank you very much. Have a happy Thanksgiving.

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